

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 802 OF 1994



BETWEEN :

BROWN KAFANYANGA PLAINTIFF

- and -

SENETA KONDOWE 1ST DEFENDANT

ROYAL INSURANCE INTERNATIONAL 2ND DEFENDANT

CORAM : MBALAME, J

Masumba, of Counsel, for the plaintiff
Mazoe, of Counsel, for the defendants
Chigaru, Law Clerk

R U L I N G

This application is for a stay of execution in respect of damages awarded to the plaintiff in the sum of K35,000 in my judgement of 10th May, 1995. The application is by way of summons and is supported by an affidavit sworn by Mr. Masumba, Counsel for the defendants. The bone of contention is the amount of the award. According to the applicants this should not have exceeded K15,000.00. They contend that should the sum of K35,000.00 be paid to the plaintiff and should the applicants succeed in the appeal regarding the quantum, the plaintiff will most unlikely be able to repay the amount to the applicants making the appeal nugatory.

Under Order 59 rule 13 of the Supreme Court Practice an appeal does not operate as a stay of execution. Indeed the Court does not "make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled" pending an appeal. However, it is in the discretion of this Court to grant or refuse the stay applied for. See the Ratota (1897) P.118 and 132. In exercising that discretion the Court must consider all

the circumstances of the case prevailing. It is a good ground for stay of execution if it can be shown that if the damages and the costs are paid there is no reasonable probability of getting them back if the appeal succeeds. See Atkins vs G.Y. Ry (1886) 2 TLR 400. Counsel for the applicant contends that since the plaintiff told the Court that he is not presently employed he should, therefore, be treated as a man of no means. This is a rather general and sweeping statement. It is not safe to suggest that employment is the only source of income. One may not be employed and yet be properly remunerated from other sources. The plaintiff said football was his only source of income at the time of the accident. It is not clear as to what he is now doing for his living. The burden is on the applicants to show that the plaintiff is a man of straw and that he would not be able to refund the money paid. As I have said earlier on the plaintiff said football was his only source of income at the time of the accident. I have carefully considered the facts before me and the arguments advanced by both counsel. The applicants contend that if the plaintiff is to be paid then the sum should not exceed K15,000 because that is what the damages should have been and no more. I do not quite approve of this kind of proposal as doing so would or might to some extent pre-empt the quantum of damages on appeal. On the other hand, it is not as if these courts are not aware of the long periods appeals take. In the circumstances I order that the plaintiff be paid a sum of K20,000 leaving a sum of K15,000 pending the outcome of the appeal. This sum is to be paid into Court and invested in an interest earning account.

Made in Chambers this 20th day of November, 1995 at Blantyre.



R.P. MBALAME
JUDGE

